SUPREME COURT, U. S.

No. 71-1041

Supreme Court, U. S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1971

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EMIL P. TAXAY, M.D., PETITIONER

v.

JOHN H. SHAFFER, Administrator of the Federal Aviation Administration, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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**MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION**

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**ERWIN N. GRISWOLD,**
*Solicitor General,*
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*Washington, D.C. 20530.*

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The Federal Aviation Act empowers the Administrator of the Federal Aviation Administration ("FAA") to delegate to private persons his statutory responsibilities concerning the examination, inspection and testing of applicants for airman certificates. Under the Act, the Administrator "may rescind" any such delegation "at any time and for any reason which he deems appropriate." 49 U.S.C. 1355(a).

In 1961, the Administrator appointed petitioner, a private physician, as an Aviation Medical Examiner ("AME"), authorized to examine airmen and issue medical certificates. By its terms, the appointment

expired annually, but was subject to renewal each year at the FAA's discretion (14 C.F.R. 183.15(b)).

In 1970, the FAA's Regional Flight Surgeon advised petitioner that it had been determined that his reappointment "would not be in the best interest of" the FAA; petitioner was notified that "your appointment which expires this month will not be renewed" (Pet. App. 13c). On request of petitioner's counsel, the FAA stated as reasons for its decision petitioner's recent service as a regular consultant to an attorney representing pilots having difficulty obtaining FAA certification, and his testimony before the National Transportation Safety Board on behalf of pilots who had been denied FAA certificates (Pet. App. 15c-17c).

Petitioner then filed a "complaint" with the Administrator (Pet. App. 2c-12c), challenging the FAA's refusal to reappoint him and demanding an investigation. The matter was referred to a separate office within the FAA "unrelated to either the Office of Aviation Medicine or the Office of the General Counsel" (Pet. App. 1c). Based on that office's "independent evaluation and recommendation" (*ibid.*), the FAA "concluded that there does not exist any reasonable basis for reversal of the decision * * * not to redesignate [petitioner]" (*ibid.*).

Petitioner then sought review of the Administrator's decision in the United States Court of Appeals for the District of Columbia Circuit, pursuant to 49 U.S.C. 1486. That provision prescribes that "[a]ny order, affirmative or negative, issued by the * * * Administrator under this chapter [with an exception not rele-

vant here] * * * shall be subject to review by the courts of appeals * * * upon petition * * *." 49 U.S.C. 1486 (a). The court of appeals, relying on its recent decision in *International Navigators Council of America* v. *Shaffer*, 444 F.2d 904 (C.A.DC.), dismissed the petition "for lack of jurisdiction" (Pet. App. 1a-2a).

Petitioner contends here, as he did below, that the decision of the Administrator not to redesignate him was, in effect, a reviewable "order" within the meaning of 49 U.S.C. 1486.[1] We do not agree.

The statutory provision in question is intended only to cover action taken by the Administrator when acting in a quasi-judicial capacity. Under the Federal Aviation Act, an "order" may be entered, after notice and a hearing, to compel airmen, air carriers, and other persons to comply with the Act or the regulations promulgated thereunder (49 U.S.C. 1482(c)). The order must "set forth the findings of fact upon which it is based, and * * * be served upon the parties to the proceeding and the persons affected by such order." 49 U.S.C. 1485(f). If supported by substantial evidence, the findings of fact shall be conclusive. 49 U.S.C. 1486 (e). Congress, in giving the courts of appeals jurisdiction to review directly certain action of the FAA Administrator, spoke only in terms of "orders," containing "findings of fact," entered in a quasi-judicial proceeding (49 U.S.C. 1486(a)); as the court below held in

[1] Petitioner does not now claim that the adverse decision with respect to his "complaint" is a reviewable "order" under 49 U.S.C. 1486 (Pet. 6). That argument was expressly rejected by the District of Columbia Court of Appeals in *International Navigators Council of America* v. *Shaffer*, *supra*.

*National Business Aircraft Association, Inc.* v. *Volpe*, C.A.D.C., No. 22,636, decided April 22, 1969, it was not the legislative intent to provide for direct court of appeals review of the Administrator's exercise of his quite separate regulatory functions, such as the issuance of regulations and rules, or the setting of safety standards.

Nor did Congress intend in 49 U.S.C. 1486(a) to provide for direct court of appeals review of the internal, administrative determinations of the Administrator relating to the appointment of a private physician to act as his representative in issuing medical certificates to airmen. The "delegation" provision of the Act (49 U.S.C. 1355(a)) expressly states that the Administrator may delegate his powers and duties to private persons "subject to such regulations, supervision and review as he may prescribe"; and the Act provides that he "may rescind any delegation made by him pursuant to this subsection at any time and for any reason which he deems appropriate." Unlike his authority to enter "orders," the Administrator is not required by the "delegation" provision to condition his appointment decisions on a quasi-judicial hearing; nor is there any requirement that his determination be supported by "findings of fact." No matter how one characterizes his exercise of authority in this area, the Administrator has not, by refusing to renew an annual appointment, entered an "order" within the meaning of the statutory review provision. Accordingly, the court of appeals properly held that it lacked jurisdiction in the present

case. See *International Navigators Council of America* v. *Schaffer, supra.*[2]

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*

MARCH 1972.

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[2] Petitioner also contends that the courts of appeals "rejected" his argument that the Administrator's refusal to renew his appointment without a hearing was a violation of due process of law. But, since the case was decided below on jurisdictional grounds, the due process question was never reached. At all events, petitioner's constitutional claim is insubstantial. As this court stated in *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895: "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government[al] function involved as well as of the private interest that has been affected by governmental action. Where it has been possible to characterize that private interest (perhaps in oversimplification) as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required" (footnote omitted). Such a characterization covers the Administrator's decision not to renew petitioner's appointment. See, *e.g.*, *Medoff* v. *Freeman* 362 F.2d 472, 475 (C.A. 1); *Jaeger* v. *Freeman*, 410 F.2d 528, 531 (C.A. 5).

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